

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL **74-1319** ^B
P/S

IN THE
United States Court of Appeals
For the Second Circuit

WESTINGHOUSE BROADCASTING COMPANY,
INCORPORATED, KYW-TV,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

DIRECTORS GUILD OF AMERICA, INCORPORATED,
Intervenor.

On Petition to Review and Set Aside an Order of the
National Labor Relations Board and Cross-Application
for Enforcement of Same

PETITIONER'S BRIEF

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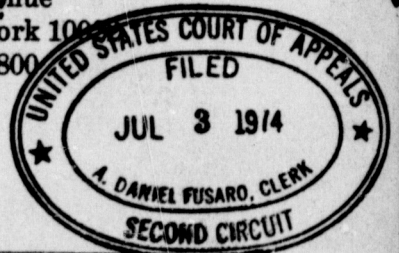


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IN THE
United States Court of Appeals
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Docket No. 74-1319

WESTINGHOUSE BROADCASTING COMPANY,
INCORPORATED, KYW-TV, *Petitioner,*
against
NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and
DIRECTORS GUILD OF AMERICA, INCORPORATED, *Intervenor.*

**On Petition to Review and Set Aside an Order of the
National Labor Relations Board and Cross-Application
for Enforcement of Same**

PETITIONER'S BRIEF

Issues Presented for Review

1. Whether there is substantial evidence in the record considered as a whole to support the finding of the National Labor Relations Board that Petitioner violated Sections

8(a)(5) and 8(a)(1) of the National Labor Relations Act, as amended, by refusing to bargain collectively with the Directors Guild of America.

a. Whether there is substantial evidence in the record considered as a whole to support the Regional Director's¹ determination that the producer-directors at Petitioner's television station are not supervisors within the meaning of Section 2(11) of the Act.

b. Whether there is substantial evidence in the record considered as a whole to support the Regional Director's determination that producer-directors at Petitioner's television station are not "managerial employees".

1. On June 18, 1974, after oral argument, this Court denied Petitioner's motion to remand to the Board the proceedings on this Petition for Review so that the Board could consider Petitioner's Request for Review of the Regional Director's Decision and Direction of Election in light of this Court's recent decision in *KFC National Management Corp.*, — F.2d —, 86 LRRM 2271 (2d Cir. 1974).

One of the arguments Petitioner made in its motion for remand was that the Regional Director's determination remained a nullity unless and until the Board properly considers Petitioner's Request for Review of the Regional Director's Decision and Direction of Election.

In the normal case involving a Petition for Review, Petitioner would seek review of the Board's determination that its producer-directors are neither supervisors nor managerial employees, since the Board's denial of a Request for Review constitutes an affirmation of the Regional Director's decision. Rules and Regulations of the NLRB, 29 CFR 102.67(f) (1973). However, as Petitioner argued on its motion for remand and still contends herein, no lawfully constituted panel of the Board ever passed upon the issues Petitioner now requests this Court to review. Thus, Petitioner shall make reference to the determinations and actions of the Regional Director rather than of the Board itself.

Furthermore, since the Court has already considered and denied Petitioner's motion for remand, it would serve no useful purpose to repeat in this brief the arguments that Petitioner made in its brief in support of that motion. However, Petitioner hereby expressly intends to preserve all issues previously raised before this Court.

Statement of the Case

This case arises on a petition for review, and cross-petition for enforcement, of an order of the National Labor Relations Board (hereinafter the "Board") directed against Westinghouse Broadcasting Company, Incorporated, KYW-TV (hereinafter the "Company").

On April 30, 1973, the Directors Guild of America, Inc. (hereinafter the "Union" or "Intervenor"),² filed a representation petition with the Board seeking the Board's certification as the exclusive bargaining representative of a unit of producer-directors Petitioner employs at its television station, KYW-TV, located in Philadelphia, Pennsylvania. Shortly after hearings on the representation petition were completed, the Regional Director for the Fourth Region issued his Decision and Direction of Election in Case No. 4-RC-10351 in which he found, contrary to Petitioner's contentions, that producer-directors at KYW-TV were neither managerial employees nor supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. §152(11) (hereinafter the "Act"), and that, even if they were managerial employees, producer-directors at KYW-TV would be entitled to representation for purposes of collective bargaining "unless there is some cogent reason for denying such representation" (A 7).³

On August 3, 1973, pursuant to Section 102.67(b) of the Board's Rules and Regulations, 29 CFR Section 102.67(b)

2. By Order dated April 9, 1974, this Court granted the Union's motion for leave to intervene in the instant proceedings.

3. Numbers in parentheses, when preceded by "A" refer to pages in the Joint Appendix.

(1973), Petitioner requested the Board to review the Regional Director's Decision and Direction of Election. The Board, by telegraphic order dated August 22, 1973, purported to deny Petitioner's Request for Review on the grounds that it allegedly failed to raise any substantial issues warranting review, but directed that the unit placement of one of Petitioner's producer-directors be resolved through the Board's challenge procedures. Petitioner's Request for Review was not considered by a quorum of Board members.⁴

After an election, as a result of which the Union was certified as the representative of Petitioner's producer-directors, the Regional Director issued a complaint on October 16, 1973, charging that Petitioner refused to bargain with the Union in violation of Section 8(a)(5) and 8(a)(1) of the Act, as amended, 29 U.S.C. §§158(a)(5) and (a)(1).

Subsequently, on November 29, 1973, the Board's General Counsel filed a motion for summary judgment and for issuance of a Board Decision and Order. By Order dated December 7, 1973, the proceedings were transferred to the Board in Washington, D.C.

The Board granted General Counsel's motion for summary judgment in *Westinghouse Broadcasting Company, Inc. (KYW-TV)*, 209 NLRB No. 121, 85 LRRM 1615 (1974) (A 32-41). This Petition for Review and the Board's cross-petition for enforcement followed.

On May 8, 1974, subsequent to all the proceedings hereinabove described, this Court issued its decision in *KFC*

4. See footnote 1, *supra*.

National Management Corp. v. NLRB, — F.2d —, 86 LRRM 2271 (1974). Based on the decision in that case, Petitioner moved the Court for an order remanding the proceedings to the Board for proper consideration of Petitioner's request for Board review of the Regional Director's Decision in the representation case. On June 18, 1974, this Court denied Petitioner's motion for remand.

Statement of Facts

Structure of KYW-TV

Westinghouse Broadcasting Company, Inc., an Indiana corporation with its principal office located in New York City, owns and operates television stations throughout the United States including station KYW-TV in Philadelphia, Pennsylvania, where the Union was certified to represent a unit of the Company's producer-directors (A 205).

KYW-TV is a full line television station which broadcasts a wide range of television programs including news, sports, movies, and public affairs programs (A 205-206). The station is organized along departmental lines and consists of five major departments: programming, sales, engineering, promotion and business (A 199, 370). The station's general manager has overall responsibility for the operation of the station and for each of its component departments (A 198-199).

Producer-directors, whose status is here at issue, are members of the programming department which is headed by the program manager and the assistant program manager or executive producer (A 199-200). Producer-direc-

tors, together with the director of public affairs, the news director, and the production manager, whose primary function is to insure the availability of production facilities and to schedule the hours of technical personnel, all report directly to the assistant program manager (A 200-201, 370).

In addition to producer-directors, the program department includes the production unit, a group of approximately thirty people who perform the technical skills required to produce and broadcast the station's news and public affairs programs (A 201-203). The members of the production unit, all of whom report to the producer-directors, are represented by a union for purposes of collective bargaining and consist of cameramen, lightmen, propmen and stagemen (A 201-204). Within the programming department, there is also an art department consisting of an art director and six people who perform the necessary artwork for the station's programs (A 202).

Duties and Responsibilities of Producer-Directors

As their job title indicates, producer-directors play a dual role in the production and broadcasting of the Company's television programs. Although they act primarily in a directing capacity when they work in the area of news programming, producer-directors both produce and direct when they work in the area of public affairs programming (A 226-233).

Regardless of the capacity in which producer-directors work, the Company has always considered them to be an integral part of the station's supervisory and managerial staff, and, has told them both at formal meetings and in

informal discussions that the Company considers them part of the management team (A 142, 145, 172, 206-207). At no time has any producer-director ever objected to his managerial status (A 134, 145, 172).

Like all other members of management, producer-directors are paid on a monthly basis from the management payroll and are eligible to receive the same benefits received by all other management personnel. For example, they are eligible to participate in a management disability plan, a right that is not accorded to non-supervisory, non-management personnel (A 211, 354). Unlike the Company's unionized staff, producer-directors receive no paid holidays (A 352).

Producer-directors frequently attend meetings with other members of the station's managerial staff during which time they evaluate the content and quality of programs the station broadcasts, make suggestions and recommendations as to future programs, and evaluate the work of subordinate personnel (A 208-209).

News Programming

Producer-directors play the key role in determining the success or failure of the Company's basic news programs, and, at all times, they are in direct control of the news programs as they go out over the air (A 102, 220). In performing their directing function, they responsibly direct from five to nine members of the production unit, including cameramen, lightmen, stagemen and propmen, as well as audiomen who are members of the engineering department (A 219-220).

They are responsible to see that the show goes out over the air and is completed precisely at the scheduled time (A 220). Once the program is on the air, they supervise and coordinate the work of the entire production crew by telling them what to do and how to do it, and, in so doing, they exercise considerable independent judgment and discretion. For example, the producer-director exercises artistic judgment when he directs the cameramen with respect to the proper camera shot or angle he should take, and when he should take it (A 220-221). Because the producer-director controls the technical aspects of the finished product, ultimately determines what the viewing audience will see, and is the last link between the station and the viewing audience, the Company holds him responsible and accountable for the quality of the program that is broadcast (A 102, 206).

To direct the members of the production crew in their duties and to coordinate their functions, the producer-director is in constant voice contact with each individual crew member throughout the entire broadcast (A 222). Through headset communications, and a piece of equipment known as a switcher or a console, he cues each member of the crew and instructs them in the performance of their duties so that the program is broadcast smoothly and efficiently (A 222-223). In the absence of the producer-director, there is no other management official with the producer-director's skills and ability to put the program together and to insure that each member of the crew performs his job at the right time and in the proper manner (A 220-221).

Although for the purpose of efficient scheduling a member of the production unit may be assigned to a particular

program, the producer-director has authority to reassign members of the production unit to perform different functions (A 222-223).

In situations where the preceding program extends beyond its normally allotted air time and there is a conflict with the producer-director's regularly scheduled program, the producer-director has independent authority to require that his production crew work overtime so that the viewing audience can see his program in its entirety (A 222-223, 265, 297-300).

When acting as a director for the station's news programs, the producer-director has substantial contact with members of the production crew, some of whom are probationary employees. Producer-directors submit regular written reports concerning employee work performance to the assistant program manager on a daily basis and are responsible for evaluating production crew members' skill, dexterity and ability (A 124, 240-247, 345, 371-374). The Company relies very heavily on the producer-director's personnel evaluations and reports and, in the case of a probationary employee, the Company may rely *solely* on his evaluation and recommendation in determining whether to continue to employ the probationary employee beyond the probationary period, since the producer-director is best able to evaluate his ability and performance (A 242-243, 316, 339, 346, 371).

Moreover, producer-directors have authority effectively to recommend, and have in fact effectively recommended, that the Company discipline and reassign insubordinate or incompetent members of the production unit (A 225-226,

339-340). Furthermore, they have authority to suspend members of the production unit by ordering them to leave the studio if, in the producer-director's opinion, their work is unsatisfactory or if they cause a disturbance during the production of a program (A 331-334).

Public Affairs Programming

In addition to directing the station's regular news programs, each producer-director is responsible for producing and directing at least one entire program devoted to some aspect of public affairs. While their functions may differ somewhat depending on the format of the program they produce and direct, as in the case of a news program, producer-directors responsibly direct a crew of as many as nine production unit personnel in the technical aspects of the production by telling members of the crew what they are to do and when they are to do it (A 99-100, 144-145). Thus, they issue instructions to crew members with whom they are constantly in voice contact, cue them in so that they perform their duties at the proper time, and orchestrate all technical aspects of the production so that the program that goes out over the air is presented to the public as a polished, finished product (A 144-145, 227, 240). Producer-directors also have the same authority when they produce and direct non-news programs as they do when they direct news programs with respect to reassigning members of the production unit, requiring them to work overtime when necessary, evaluating probationary employees, and effectively recommending discipline of insubordinate or incompetent employees (A 297-300, 333-334, 339-341).

In connection with public affairs programs, producer-directors assume managerial duties and responsibilities in

addition to their supervisory duties since they shoulder overall responsibility for the finished product that may, in some cases, be broadcast to a nationwide audience (A 227-228, 239-240).

While the subject matter of their programs may vary from children's shows to documentaries, regardless of subject matter, the producer-directors play a key role in determining the content and format of programs they produce and direct (A 95, 212-213, 227, 229-230, 343). For example, where the program manager has no more than an idea for a new program, the producer-director submits a written "treatment" for the proposed program in which he makes detailed suggestions for the format and content of the show. As in the case of one recent children's show, "Big Kid, Little Kid", the program manager based the format and content on the producer-director's treatment and dropped most of his own ideas as to what the program's content should be (A 229-231).

Moreover, when they produce programs that utilize the talk show format, producer-directors effectively determine what viewers will see and hear, since they decide which guests are to appear on the show as well as the topics that the guests are to discuss (A 186-187, 227, 240).

In connection with its public affairs programming, the station undertakes projects in conjunction with other institutions, including institutions of higher learning and government agencies, for the purpose of producing programs of vital interest, some of which may ultimately be distributed nationally or even internationally (A 237-239). In these circumstances, the producer-director is the sole link be-

tween the station and the cooperating institutions. Acting as the Company's spokesman and representative, the producer-director provides the Company's input into the production of the program and is the only Company employee in a position to object to any material contained in the program that the Company might deem objectionable or in bad taste (A 237-239).

Depending on the type of public affairs program they produce and direct, producer-directors have full and complete authority to hire members of the staff working under their direction and control. Thus, when the Company decides to produce a special program requiring talent, the producer-director not only has authority to hire but is responsible for hiring that person (A 349-351). In the event the program requires that the subject matter be thoroughly researched, producer-directors may hire people to do the necessary research (A 350). Finally, producer-directors have authority to establish, and, if necessary, change the work schedules of staff working under their direction and control (A 348).

Producer-Directors' Authority to Implement Sizable Budgets

Because the station's non-news programs, particularly public affairs programs, do not generate commercial revenues, many have only so-called below-the-line budgets that consist of the normal operating costs of producing a show, including salaries and overhead (A 214-216). However, some shows that producer-directors produce and direct have above-the-line or out-of-pocket budgets involving thousands of dollars (A 216-217, 363-364). Where programs

have above-the-line budgets, producer-directors exercise full and complete authority to commit the Company's credit for out-of-pocket expenses for such items as guest fees, transportation of guests, honorariums, meals, props, books and records (A 217, 330). Significantly, it is the producer-director who determines whether or not the Company pays a guest an honorarium (A 327-328). Moreover, producer-directors are held fully accountable for implementing their budgets and do not require prior approval from any other management representative before they pledge the Company's credit (A 217-218, 326).

The sums of money producer-directors have authority to expend are substantial. For example, the producer-director of one talk show currently being broadcast by KYW-TV, the Martha Rose Show, has an above-the-line budget of approximately \$13,000, all of which the producer-director has authority to implement (A 364). The producer-director of that show's predecessor had an out-of-pocket budget in excess of \$30,000, and had discretionary authority to expend all or part of that sum without prior approval (A 364).

Additional facts appear in the Argument.

ARGUMENT

POINT I

Producer-directors, as the Board has already held in previously decided cases, are supervisors within the meaning of Section 2(11) of the Act.

In the proceedings in the underlying representation case on which the Board ostensibly relied when it ordered the Company to bargain with the Union, the Regional Director erroneously concluded that the Company's producer-directors did not possess sufficient indicia of supervisory authority to warrant a finding that they were supervisors within the meaning of Section 2(11) of the Act.

As we show below, not only is there no substantial evidence in the record considered as a whole to support the Regional Director's decision, and hence, the Board's order to bargain, but, to the contrary, the evidence clearly establishes that producer-directors possess not one but several of the indicia of supervisory status that Congress included in the definition of a "supervisor".

Section 2(11) of the Act defines the term "supervisor" to mean,

"... any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment" 29 U.S.C. §152(11).

Courts of Appeals, including this Court, have made it clear that this definition must be read in the disjunctive so that the possession of any one of the enumerated powers is sufficient to confer supervisory status on the person who possesses it. *Amalgamated Local Union 335 v. NLRB*, 481 F.2d 996, 999 (2d Cir. 1973); *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972).

While producer-directors admittedly do not have authority to promote, discharge, lay off, or recall the five to nine unionized employees who are assigned to work on a program under their direction and control, lack of such authority is not determinative of their status as supervisors. *NLRB v. Big Ben Department Stores*, 396 F.2d 78, 82 (2nd Cir. 1968); *The Grand Food Market*, 139 NLRB 73, 89, 51 LRRM 1272 (1962), *enf'd, sub nom., NLRB v. Crean*, 326 F.2d 391 (7th Cir. 1964).

In the *Big Ben Department Stores* case this Court upheld the Board's finding that "lead girls", who had no authority to hire, fire or discipline other employees, or even to effectively recommend such action, nevertheless were supervisors merely because they had authority to transfer junior employees from one station in the store to another as the pressure of business might from time to time require.

Producer-directors do, however, have authority to hire talent and ancillary personnel for special public affairs programs⁵ and the testimony of the Company's station

5. The Regional Director erroneously concluded that producer-directors do not have authority to hire other employees (A 6). However, the record is perfectly clear that when they act as producers, they may hire talent, research aides and other persons necessary to produce a high quality television program (A 350-351).

program manager makes it crystal clear that producer-directors have authority effectively to recommend discipline of insubordinate or incompetent members of the production unit. More importantly, as the Regional Director himself recognized, producer-directors have independent authority to suspend incompetent or unruly employees by ordering them to leave the studio during the production or broadcast of a program (A 6). That producer-directors possess the authority to suspend other employees under such circumstances undeniably clothes the Company's producer-directors with the mantle of supervisory status. 29 U.S.C. §152 (11); *Warner Co. v. NLRB*, 365 F.2d 435 (3rd Cir. 1966).

In the *Warner Co.* case the court noted (365 F.2d at 439):

"The uncontradicted testimony at the representation hearing was that the shippers can send a man home immediately for refusal to work or for reporting for work when intoxicated or otherwise unfit to drive the truck, and he can do this without any prior consultation with the yard manager. In fact, this power is necessary for the yard manager is frequently off the premises when the shippers assign the first deliveries for the day. It can scarcely be denied that sending a man home is discipline or that it does require the use of independent judgment. *West Virginia Pulp & Paper Co.*, 140 N.L.R.B. 951 (1963)."

Accord, *NLRB v. Gray Line Tours, Inc.*, *supra*, holding that, where there was uncontroverted testimony by a company executive that charter bus dispatchers had authority to send a driver home if improperly dressed or if the driver refused to operate a certain bus, the existence of such authority constitutes the power to suspend and is sufficient by

itself to make a dispatcher a supervisor within the meaning of the Act, citing *Pacific Intermountain Express Co.*, 412 F.2d 1, 4 (10th Cir. 1969) and *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 88 (6th Cir. 1964).

However, the supervisory authority of producer-directors is not limited to suspending unruly employees. They also have authority to reassign members of the crew, to assign overtime when necessary and, more importantly, to make written reports evaluating the job performance not only of regular production unit employees but also of probationary employees. Since the producer-director, because of his intimate contact with the production crew, is the only member of the management team in a position to make such evaluations, the Company relies heavily on his opinion when it makes decisions that affect the economic status and job security of regular and probationary production unit personnel (A 241-243, 339).

The Regional Director rejected these indicia of the producer-director's supervisory status by observing that a producer-director can suspend an employee or assign overtime only in unusual or emergency situations; that none of the testifying producer-directors was aware of or had exercised his authority to change a technician's job assignment, and that only one of the producer-directors testified he actually made written employee evaluations (A 6). In doing so, the Regional Director misapplied the legal principles underlying the determination of supervisory status. Both the courts and the Board have consistently held that the Act does not require that a person exercise supervisory powers for all or any particular portion of his time to qualify as a supervisor; it is the *existence* of such power and

not the frequency of its utilization that ultimately determines supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971); *Yamada Transfer*, 115 NLRB 1330, 38 LRRM 1067 (1956) (supervisory authority not exercised for two years); *United States Gypsum Company*, 93 NLRB 91, 92, 27 LRRM 1367 (1951) (failure or refusal of employees to exercise supervisory authority is not controlling and does not destroy their supervisory status). On this basis alone, the determination of the Regional Director in this case is clearly erroneous.

But even aside from the Regional Director's errors with respect to these particular indicia of the supervisory status of producer-directors, a fair reading of the record, one that is "not . . . one sided, concentrating only on the evidence which might support the Board's findings," *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 763 (7th Cir. 1973), unquestionably demonstrates that producer-directors not only have the authority responsibly to direct, but in fact spend a substantial part of their work day responsibly directing, an entire crew of production unit employees on a daily basis.

The existence and exercise of this directing authority alone is sufficient as a matter of law to confer supervisory status upon them. *Keener Rubber Inc. v. NLRB*, 326 F.2d 968 (6th Cir.), cert. denied, 377 U.S. 933 (1964); *NLRB v. Fullerton Publishing Company*, 283 F.2d 545 (9th Cir. 1960); *Ohio Power Co. v. NLRB*, supra; *Great Western Broadcasting Corp.*, 192 NLRB 1203, 78 LRRM 1163 (1971); *Radio & Television Station WFLA (The Tribune Company)*, 120 NLRB 903, 42 LRRM 1100 (1958).

In *Ohio Power Co. v. NLRB*, *supra*, the Sixth Circuit defined the statutory term "responsibly to direct" as follows:

"To be responsible is to be *answerable for the discharge of a duty or obligation*. Responsibility includes judgment, skill, ability, capacity and integrity and is implied by power." 176 F.2d at 387 (Emphasis added)

The record discloses that whether producer-directors act solely as directors with respect to the station's news programs or in their dual capacity as producers and directors of the station's public affairs programs, while the program is on the air they maintain constant voice communication with each member of the production crew including lightmen, cameramen, propmen, audiomen and projectionists, giving them instructions and coordinating their functions. They directly control what goes out over the air while they are in the control room (A 220). The same responsible direction takes place when producer-directors prepare a taped program (A 103-104). For this reason the Company looks for leadership qualities when hiring producer-directors.⁶

6. The Company hired Richard Pyle, one of the producer-directors who testified for the Union at the hearing, because he was a "take-charge guy" who would exemplify more of the leadership qualities the Company was looking for in its producer-directors. When he was interviewed for the job, Mr. Pyle told the Company that he was anxious to become a producer-director at KYW-TV because "that was the kind of guy he was," a take-charge guy and a leader (A 210). Thus, the Company not only gave him supervisory authority, but also expected him to use that authority in the role of a "take-charge guy" or "leader". In light of the above, Mr. Pyle's testimony concerning the passive role he plays as a producer-director conflicts with his own self-evaluation and serves only to demonstrate that Mr. Pyle did not fully exercise the broad authority the Company vested in him.

Undisputed testimony at the hearing also shows that it is the producer-director alone who is "answerable" for the success or failure of the Company's only product, a high quality television production. In fact, one producer-director who testified for the Union at the hearing admitted that he takes the blame and is responsible for whatever deficiencies there are in the technical aspects of the program when it goes out over the air (A 102). Furthermore, the station's program manager confirmed that the producer-director alone is responsible for the quality of the program in the following testimony:

"And, I'll ask you, Mr. Salzman, let's take the program like Big Kid, Little Kid for example; you view it a few times and you are dissatisfied with: (a), the content; and also let's say the end product as it goes over the air; who do you go to about that? A. If I view it and I don't like what's going out on the air.

Q. Yes. A. Fortunately it hasn't happened in conjunction with that show, because it's been going O.K. But, I'd go to the producer/director; there's no one else to go to.

Q. In other words you view the producer/director as the person who is responsible for that particular show? A. They're in charge of it, and they're accountable for it; if we don't like something about the show, we'll bring the person into the office and sit down and talk and find out why; sometimes you know you're at home and you look at something and say, gee, why did they do that, and sometimes the circumstances that were prevailing when the show was produced, it was necessary; you can't jump to any conclusions. So, you have to talk to the person who is in charge."
(A 228)

Since the early days of commercial television the Board has consistently recognized that it is an integral part of the

job function of television directors and producer-directors to responsibly direct station employees in the presentation of studio telecasts and to be responsible for the content and quality of the programs they direct. For this reason the Board has consistently held such employees to be supervisors under the Act. *WCAU, Inc.*, 93 NLRB 1003, 27 LRRM 1552 (1951); *American Broadcasting Company (KECA-TV)*, 93 NLRB 1410, 27 LRRM 1585 (1951); *American Broadcasting Company (KGO-TV)*, 94 NLRB 100, 28 LRRM 1022 (1951); *Midwest Radio-Television, Inc.*, 111 NLRB 337, 430, 35 LRRM 1470 (1955); *WTOP, Inc.*, 114 NLRB 1236, 37 LRRM 1143 (1955); *Northwest Publications, Inc.*, 116 NLRB 1578, 39 LRRM 1052 (1956); *Radio & Television Station WFLA, supra*; *El Mundo, Inc. (WKAQ-TV Telemundo)*, 127 NLRB 538, 540, 46 LRRM 1059 (1960); *WTAR Radio-TV Corporation*, 168 NLRB 976, 978, 67 NLRB 1062 (1967); *Great Western Broadcasting Corp. (KXTV), supra*.

In *Great Western Broadcasting, supra*, as in this case, producer-directors were

"... responsible for the coordination and presentation of live news shows, video-taped and special programs, commercials, promotional spots and public announcements." 192 NLRB at 1204.

The Board found that, like the Company's producer-directors, the producer-directors in *Great Western Broadcasting*,

"responsibly direct the employees in presenting the shows whether acting as the director or as a producer-director of shows for which they have full responsibility from the planning stage through the presentation over the air. We shall, therefore, exclude them from the unit as supervisors within the meaning of the Act."

192 NLRB at 1204, 78 LRRM at 1165-1166. (Footnotes omitted).

As in *Great Western Broadcasting*, the evidence in this case establishes that producer-directors have full responsibility for programs they produce from the planning stage through presentation over the air. A clear example is the television program "Big Kid, Little Kid."

The Board has found producer-directors to be supervisors even in cases where, like the present one, the small size of the station limited the full scope of the producer-directors' authority. Thus, in *Radio and Television Station WFLA, supra*, at 904-5, the Board disposed of the status of the television directors there involved in the following language:

"The Employer would exclude directors from any unit as supervisors within the meaning of the Act. Although there is some conflict in the evidence, it appears that directors are responsible for the coordination and presentation of their shows and operate a control panel in order to switch from one camera to another or to and from film selections. The Employer's directors exercise less authority than some of those employees with like classifications in larger stations but, nevertheless, they do responsibly direct the employees involved in presenting the commercials and programs emanating from WFLA. Therefore, we shall exclude them as supervisors within the meaning of the Act."

The Board, through its Regional Director, reached the same conclusion regarding the status of Petitioner's producer-directors at its station in San Francisco. *Westinghouse Broadcasting Co., Inc. (WKPIX, San Francisco)*, 20

RC 9664 (April 23, 1971). In addition, the Board has recognized the supervisory status of Petitioner's news producers whose responsibility for news programs is the same as the responsibility of producer-directors for public affairs programs. *Westinghouse Broadcasting Company, Inc. (WJZ-TV, Baltimore)*, 195 NLRB 339, 79 LRRM 1323 (1972); *Westinghouse Broadcasting Co., Inc. (KPIX, San Francisco)*, 188 NLRB 157, 76 LRRM 1277 (1971).

In such circumstances, to grant enforcement of the Board's order in this case would clearly violate "the great principle that like cases must be treated alike" that this Court has applied in other cases where the Board has either failed or been unable to distinguish its previous decisions when reaching a result contrary to those decisions. *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 905 (2d Cir. 1971).

Finally, if, as the Board and the Union contend in this case, producer-directors are not supervisors and are not answerable for the performance of the production crew, then one is faced with the absurd conclusion that the Company's television programs are produced without any immediate supervision of the people whose technical skills are required to get the program on the air. Not only is such a situation "highly unlikely," but, as a practical matter, no employer, particularly an employer like Petitioner whose television station must be operated in the public interest and is subject to administrative regulation by various governmental agencies, could permit such a situation to exist. *Cf. Vega v. NLRB*, 341 F.2d 576, 577 (1st Cir.), *cert. denied*, 382 U.S. 862 (1965), where the Court stated:

“In this case we regard it as of considerable importance that if the petitioners were not supervisors the company's employees were entirely without supervision a large part of the time.”

See also, NLRB v. Supreme Dyeing & Finishing Corp., 340 F.2d 493, 494 (1st Cir. 1965).

POINT II

Producer-directors are managerial employees and, therefore, do not constitute an appropriate unit for purposes of collective bargaining.

In reaching his decision that the Company's producer-directors are not managerial employees, the Regional Director concluded that the discretion and responsibility the Company vests in producer-directors is subject to well-defined policies formulated by their superiors and that none of the producer-directors has broad authority to extend the employer's credit. In addition, he concluded that, even if they were managerial employees, they nevertheless would be entitled to representation under the Act, unless there was some cogent reason for denying them representation, and that the record did not reveal the existence of any such reason.

With respect to the latter conclusion, there can be no doubt but that the Regional Director erred as a matter of law. *NLRB v. Bell Aerospace Company Division of Textron, Inc.*, — U.S. —, 42 U.S.L.W. 4565 (U.S. April 23, 1974). There, the United States Supreme Court affirmed, in part, the decision of this Court holding that Congress fully intended to exclude from the protection of the Act all

employees properly classified as "managerial," not just those in positions susceptible to conflicts of interest in labor-relations.

Thus, the only question before this Court with respect to this issue is whether the evidence in the record supports the Regional Director's finding that the Company's producer-directors are not managerial employees as the Board has previously defined that term. We submit that it does not.

Beyond any doubt, the duties and responsibilities that producer-directors have with respect to the station's news and public affairs programs places them squarely within the ambit of both prongs of the two-pronged definition of managerial employee that the Board has hammered out using its adjudicatory powers, and that courts of appeals have summarized as,

- (a) Whether an employee is so closely related to management as to place the employee in a potential conflict of interest between his employer on one hand and his fellow workers on the other, or
- (b) Whether the employee is formulating, determining or effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties.

Bell Aerospace Company Division of Textron, Inc., 475 F.2d 485, 494 (2d Cir. 1973), *aff'd in part*, — U.S. —, 42 U.S.L.W. 4565 (U.S. April 23, 1974); *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969); *Retail Clerks International Ass'n. v. NLRB*, 366 F.2d 642, 644-645 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

With respect to the first part of the Board's definition, it is perfectly clear that, in light of their labor relations functions at the station, to permit producer-directors to be represented by a union for purposes of collective bargaining would create exactly that kind of potential conflict of interest that the Board sought to avoid by excluding managerial employees from appropriate bargaining units. *Cf. Retail Clerks International Ass'n, supra; New England Telephone*, 90 NLRB 639, 646, 26 LRRM 1259 (1950). Further, as Justice Douglas remarked in his dissent in *Packard Co. v. Labor Board*, 330 U.S. 485, 493 (1947), any decision in this case, other than one holding producer-directors to be managerial employees, would tend "to obliterate the line between management and labor".

With respect to the latter half of the Board's definition, the Company has always considered producer-directors to be an integral part of the station's managerial staff. Consequently, producer-directors act as representatives of and spokesmen for the Company whenever it engages in cooperative ventures with government agencies and institutions of higher learning for the production of television programs in the public interest. Under such circumstances, the Board has held that the mere holding out of an employee as a management agent or spokesman is sufficient to confer managerial status, even though the employee so held out does not have authority to act for the employer. *Ramar Dress Corp.*, 175 NLRB 320, 329, 70 LRRM 1607 (1969).

Here, however, producer-directors not only have authority to speak for the Company, but actively "formulate, determine and effectuate management policies . . . in that they express and make operative decisions of manage-

ment". *Ford Motor Co.*, 66 NLRB 1317, 1322, 17 NLRB 394 (1946). Thus, producer-directors clearly exercise managerial prerogatives when they screen and ultimately determine the guests that appear on the Company's talk shows, and determine the topics that host and guests must discuss during the show. Similarly, producer-directors continuously express and make operative management policy by virtue of the fact that they determine, in conjunction with the program manager and executive producer, the content and format of programs the Company produces. To that extent, producer-directors are active participants in formulating, determining, effectuating management policies and expressing the Company's viewpoints through its public affairs broadcasts. Cf. *Wichita Eagle & Beacon Publishing Co.*, 480 F.2d 52 (10th Cir. 1973), *cert. denied sub nom.*, *Newspaper Guild v. Wichita Eagle and Beacon Publishing Co.*, — U.S. —, 42 U.S.L.W. 3628 (U.S. May 13, 1974).

Assuming, *arguendo*, that all the foregoing were insufficient to persuade this Court that the Company's producer-directors are managerial employees, "the authority possessed by these employees to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." *Spicer Manufacturing Corp.*, 55 NLRB 1491, 1498, 14 LRRM 112 (1944).

Despite the Regional Director's contrary conclusion, the record in this proceeding conclusively demonstrates that producer-directors have full authority to commit the Company's credit in those situations where the programs they produce and direct have above-the-line budgets. The Board has long held that such kind of authority is a significant signpost of managerial status. *Ed's Foodland of Spring-*

field, Inc., 159 NLRB 1256, 1260, 62 LRRM 1465 (1966) (department manager); *Weaver Motors*, 123 NLRB 209, 215-216, 43 LRRM 1400 (1959) (parts manager); *Barrett Div., Allied Chemical & Dye Corp.*, 65 NLRB 903, 905 (1946) (buyer); *Vulcan Corp.*, 58 NLRB 733, 736, 15 LRRM 66 (1944) (same).

Significantly, producer-directors have authority to pledge substantial sums of money on behalf of the Company and the discretion the Company vests in them with respect to the purposes for which they pledge the Company's credit is extremely broad. Thus, one talk show currently being broadcast by the Company has an above-the-line budget of approximately \$13,000.⁷ That show's predecessor, produced and directed by one of the producer-directors who testified for the Union at the hearing had an even greater budget that was in excess of \$30,000. In both cases, the show's producer-director had full authority to determine exactly how to expend the funds in those budgets and to expend all or part of their budgets without prior approval from any other representative of management.

The Board has held to be managerial individuals who exercise far less authority and discretion in making binding commitments on behalf of their employers than the producer-directors in this case. *See e.g., Albuquerque Div., ACF Industries Inc.*, 145 NLRB 403, 414-415, 54 LRRM 1393 (1963) (buyers had authority to commit their employer's credit up to \$2,500); *Federal Tel. & Radio Co.*,

7. The Regional Director's determination that producer-directors were not managerial employees was premised upon a completely erroneous factual determination that only one producer-director was allotted a budget for a program and that the budget amounted to \$5,000 (A 7).

120 NLRB 1652, 1653-1654, 42 LRRM 1230 (1958) (buyers and buyers' assistants held to be managerial employees where they could order merchandise amounting to less than \$2,500 without prior approval); *Swift & Co.*, 115 NLRB 752, 753, 37 LRRM 1391 (1956) (procurement drivers held to be managerial even though, for the most part, they could only offer prices predetermined by their employer).

Thus, the producer-directors in this case, like the employees in the cases cited above, by virtue of their authority to pledge the Company's credit "exercise a function closely related to management," *Barrett Div., Allied Chemical and Dye Corporation, supra*, at 905, are "representatives of management and as such may not be accorded bargaining rights under the Act." *American Locomotive Co.*, 92 NLRB 115, 117, 27 LRRM 1064 (1950).

Conclusion

For the foregoing reasons, this Court ought to grant the Company's petition to review and set aside the order of the National Labor Relations Board and deny the Board's cross-petition for enforcement of its order.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

Intervenor.

Index No.

That on the 3rd day of July, 1974, she served the annexed Brief on the attorney~~(s)~~ hereinafter named by depositing ^(two)~~(one)~~ true copy (ies) thereof contained in (a) securely sealed, post-paid wrapper~~(s)~~, properly addressed to the said attorney~~(s)~~ as follows:

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in the letter box regularly maintained and exclusively
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Donna Giglio
DONNA GIGLIO

Sworn to before me this
3rd day of July, 1974.

Joseph Warren

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976

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